Nos. 16-1436, 16-1540

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IN THE

Supreme Court of the United States

DONALD J. TRUMP, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF SOUTHEASTERN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Everson v. Bd. of Educ. of Ewing Twp.,
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Cited Authorities

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Fiallo v. Bell,
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Hamdan v. Rumsfeld,
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INS v. Aguirre-Aguirre,
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McCutcheon v. FEC,
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Zubik v. Burwell,
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U.S. Const. art. II, § 2 12

U.S. Const. art. II, § 3 13

U.S. Const. art. VI 13

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Other Authorities

1 Robert North Roberts et al., *Presidential Campaigns, Slogans, Issues, and Platforms: The Complete Encyclopedia* (2012) 10

Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647 (1996) 12

Alexander M. Bickel, *The Least Dangerous Branch* (1962) 11

Att'y Gen. Jeff Sessions, *Remarks on Revised Executive Order Protecting the Nation from Foreign Terrorist Entry* (Mar. 6, 2017) 12

Conway: Trump Will Not Pursue Immigration Ban Based Solely on Religion, CNN (Dec. 22, 2016).....21

Donald Trump Back-Pedals on Banning Muslims from U.S., Wall Street Journal (June 28, 2016) 17

Donald Trump: "I Think Islam Hates Us", CNN (Mar. 10, 2016) 22

Donald Trump Says His Muslim Friends Support His Muslim Ban, Seattle Post-Intelligencer, 2015 WLNR 37529330 (Dec. 16, 2015).....16

Cited Authorities

Page

Here's What President Donald Trump's Immigration Executive Order Means, ABC (Jan. 29, 2017) 21

Katherine Krueger, *Trump Pivots: Only Muslims from 'Terrorist Countries' Would Be Banned*, Talking Points Memo (June 25, 2016) 18

Kilmeade's Wide-Ranging Interview w/ Donald Trump, Fox News Radio (May 11, 2016).....17

Miller: New Order Will Be Responsive to the Judicial Ruling, Fox News (Feb. 21, 2017) 22

MSNBC Morning Joe Interview with Donald Trump (R), Presidential Candidate, Regarding Muslims in America and Homeland Security, MSNBC, 2015 WLNR 36290582 (Dec. 8, 2015)....16

Obama Angers Midwest Voters with Guns and Religion Remark, The Guardian (Apr. 14, 2008).....14

President Trump's Speech to the Arab Islamic American Summit, White House (May 21, 2017).....23

Press Gaggle by Press Secretary Sean Spicer, White House (Mar 6, 2017).....22

Cited Authorities

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Press Release, *Donald J. Trump Addresses Terrorism, Immigration, and National Security* (June 13, 2016).....17

Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299 (2016).....13

Roy F. Baumeister, *The Cultural Animal* (2005).....12

Sec'y John Kelly, *Statement on President's Executive Order Signed Today* (Mar. 6, 2017).....12

Sec'y Rex Tillerson, *Remarks on the President's Executive Order Signed Today* (Mar. 6, 2017).....12

Stephen J. Wayne, *Road to the White House 2016* (10th ed. 2015).....10

The Final Push: Clinton, FactCheck.org (Nov. 4, 2016).....18

The War on Terror, the Political Equation, Fox: O'Reilly Factor, 2015 WLNR 35053429 (Nov. 26, 2015).....16

Transcript, *David Muir Interviews President Trump*, ABC News (Jan. 25, 2017).....21

Transcript: Donald Trump's National Security Speech, Politico (June 13, 2016).....17

Cited Authorities

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Transcript, *Meet the Press* (July 24, 2016).....19

Trump Changing Muslim Ban to Countries with Terror Links, Newsmax (June 27, 2016).....18

Trump on Latest Iteration of Muslim Ban, CNN (July 24, 2016).....17

Trump: 'Frankly, We're Having Problems with the Muslims', The Hill (Mar. 22, 2016), ...22

What Is Donald Trump Even Running on Anymore? His "Muslim Ban" Shift Sells Out His Core Constituents, Vox (June 28, 2016) 17

World News Tonight with David Muir, ABC World News, 2015 WLNR 34794508 (Nov. 23, 2015).....16

IDENTITY & INTEREST OF *AMICUS CURIAE*

Southeastern Legal Foundation ("SLF") is a nonprofit, public-interest law firm and policy center. Founded in 1976, SLF is dedicated to advocating for individual liberties in the courts of law and public opinion. SLF's interest in this case stems from its profound commitment to protecting America's legal heritage. That heritage includes the separation of powers, a critical safeguard of individual liberty.

SLF submits this brief principally to address one particularly disturbing aspect of the decision below: the Fourth Circuit's reliance on media statements to discern the "real purpose" behind Executive Order 13,780. Consulting these statements intrudes on the prerogative of the Executive Branch by allowing individuals outside the Article II hierarchy to speak for the President. Worse still, the Fourth Circuit consulted these statements to override the President's assessment of national security. And it read them in the worst possible light for the President, refusing to give him the presumption of regularity commensurate with his office. None of this bodes well for separation of powers.

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* Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Fourth Circuit has invoked the Establishment Clause to enjoin an executive order that bars certain aliens from entering the United States. *See* Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ("Order"). According to the court of appeals, the Order targets Muslims. But that is untenable. The Order's text is not discriminatory: it treats all religions the same. The Order's effect is not discriminatory: it targets countries known to have weak vetting procedures. And the Order's purpose is not discriminatory: the official statements about the Order show that it was enacted to promote national security. Yet, for the first time in our history, courts have enjoined a President's order based on things he said on the campaign trail. That is precisely what the Fourth Circuit did here.

This unprecedented ruling should be reversed. The evidence is not relevant, appropriate, or persuasive. When it comes to the admission of aliens, courts must defer to the political branches. Courts do not look behind the text of an order to discover its "real" purpose. Moreover, presidential candidates are not the President and, constitutionally, they cannot speak for him. Nor are their statements especially probative; proclamations on the campaign trail are ambiguous, contradictory, and quickly forgotten. Put simply, the decision is built on an illegitimate legal foundation. Courts should not evaluate federal laws this way.

But if courts are going to consult these statements, they should at least give the speaker the benefit of the doubt and require much more proof of animus than the Fourth Circuit had here. There is ample evidence that,

from the start, the so-called "Muslim ban" was not born of religious animus. But even if the Court disagrees, the better reading of the evidence is that Donald Trump abandoned that type of idea during the campaign in favor of an entirely legitimate territory-based policy. In other words, the Fourth Circuit relied not only on statements from the 2016 campaign, but a heavily revisionist version of them. This Court should reverse the decision below.

ARGUMENT

The Fourth Circuit's decision is indefensible. First, the Order's legality must be determined based on its text. Second, even if courts can go beyond the Order's text, unofficial campaign statements cannot be used to determine the Order's purpose. Third, and last, the ruling below is wrong even if this evidence is relevant to proving an Establishment Clause claim. It does not show anti-Muslim bias.

I. The Fourth Circuit impermissibly ventured beyond the text to determine the Order's purpose.

As Chief Justice Warren cautioned nearly fifty years ago, "[i]nquiries into [the government's] motives or purposes are a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). For one thing, "discerning ... subjective motivation," even for "a single [actor]," is "almost always an impossible task." *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting). For another, judicial evaluation of a law's purpose can easily morph into evaluation of a law's wisdom. "[T]hat the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted" is tempting

in theory, but dangerous in practice. *McCray v. United States*, 195 U.S. 27, 56 (1904). Indulging it "would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions." *Id.* at 54-55. Courts therefore must evaluate the purpose of a law "with the most extreme caution." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 6 (1947). "[T]he stakes are sufficiently high for [courts] to eschew guesswork." *O'Brien*, 391 U.S. at 384.

To that end, courts generally look to the text of a law to determine its purpose. *See, e.g.*, *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973); *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971). Because courts "presume that [the government] act[s] in a constitutional manner," *Illinois v. Krull*, 480 U.S. 340, 351 (1987), they are "reluctan[t] to attribute unconstitutional motives" to it "when a plausible secular purpose ... may be discerned from the face of the [law]." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). And because the "text" of a law is the only thing that the government actually "adopted," it is the "best evidence of [the law's] purpose." *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991). That is why courts "must begin with the language employed by [the law] and the assumption that the ordinary meaning of that language accurately expresses [its] purpose." *Engine Mfrs. Assn. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004).

The judicial inquiry must end there, too, when the law regulates the admission of aliens into the United

States. In *Kleindienst v. Mandel*, this Court held that "the Executive" need only offer "a *facially* legitimate and bona fide reason" for denying entry to aliens. 408 U.S. 753, 770 (1972) (emphasis added). Once the Executive does so, "'courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against' the constitutional interests" of the affected individuals. *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring in judgment). There are no exceptions. This Court has applied *Mandel* to claims of discrimination under the First Amendment, *id.* at 765-70, and the Fifth Amendment, *Fiallo v. Bell*, 430 U.S. 787, 791-99 (1977); *see also* Brief for the Petitioners ("Pet. Br.") 63-65.

The reasons that underlie *Mandel*'s "narrow standard of review" are the same "reasons that preclude judicial review of political questions." *Fiallo*, 430 U.S. at 796. The Constitution generally commits questions concerning the admission of aliens to the political branches—not the courts. Congress has "plenary ... power to make policies and rules for exclusion of aliens," which it "has delegated ... to the Executive." *Mandel*, 408 U.S. at 769-70; *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-43 (1950); *see* 8 U.S.C. § 1182(f). "'[O]ver no conceivable subject is the legislative power of Congress more complete" because "the admission of aliens" is "a fundamental sovereign attribute." *Fiallo*, 430 U.S. at 792. In this area, courts are ill-equipped to weigh the competing concerns. The admission of aliens involves "a wide variety of classifications [that] must be defined in the light of changing political and economic circumstances," and the "decisions in these matters may implicate our relations with foreign powers." *Id.* at 796. "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic

repercussions." *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999).

The *Mandel* rule "has particular force in the area of national security." *Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring in judgment). "[W]hen it comes to collecting evidence and drawing factual inferences" on questions of national security, "the lack of competence on the part of the courts is marked." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). When the political branches act in the national-security realm, courts should be hard-pressed to discard their stated purpose. After all, "most federal judges" do not "begin the day with briefings that may describe new and serious threats to our Nation and its people." *Id.* It is simply "not the judicial role in cases of this sort to probe and test the justifications for the [government's] decision." *Fiallo*, 430 U.S. at 799.

The Ninth Circuit has concluded that *Mandel* applies only to "an individual visa application," not the "*promulgation* of sweeping immigration policy ... at the highest levels of the political branches." *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017). But this distinction "cannot withstand the gentlest inquiry." *Washington v. Trump*, 858 F.3d 1168, 1179 (9th Cir. 2017) (Bybee, J., dissental). *Mandel* applies to "a wide variety" of "decisions made by the Congress or the President," including whether "particular classes of aliens ... shall be denied entry altogether." *Fiallo*, 430 U.S. at 796.

The Fourth Circuit wisely acknowledged that *Mandel* applies to the Order, but it nevertheless found that the Order's national-security justifications were not "facially legitimate and bona fide." Pet. App. 42a-47a.

The Fourth Circuit interpreted "bona fide" to require that the proffered reason for the Order be the actual, primary reason—to be determined by consulting all of the extratextual evidence. That ruling finds no support in this Court's decisions.

The word "facially" in *Mandel* modifies both "legitimate" and "bona fide"; just like its legitimacy, the Order's bona fides must be determined based on the text alone. *See* Pet. App. 162a-65a (Niemeyer, J., dissenting). Otherwise, *Mandel* is meaningless. As the Fourth Circuit acknowledged, the *Lemon* test already requires courts to assess a law's primary purpose. *Id.* at 46a (majority op.). *Mandel* was not meant to simply duplicate this analysis; it requires the political branches to prove *less* out of respect for their authority over the admission of aliens. Hence, *Mandel* asks whether the Executive offered "*a* facially legitimate and bona fide reason," not whether that reason was the primary one. 408 U.S. at 770 (emphasis added).

Searching for the primary purpose would require courts to enter the forbidden territory of "look[ing] behind" the Executive's justifications, *id.*, and "prob[ing] and test[ing]" them, *Fiallo*, 430 U.S. at 799. Here, for example, a federal court could conclude that national security was not the primary purpose of the Order only by first rejecting the accuracy of the President's national-security determinations. Indeed, the Fourth Circuit stated that the Order is based on "weak evidence" and does not "diminish the threat of potential terrorist activity." Pet. App. 44a. The specter of courts telling the President what national security requires is precisely what *Mandel* seeks to avoid.

The Fourth Circuit's principal rejoinder—that the immigration power "is still 'subject to important constitutional limitations,'" Pet. App. 40a-41a, 45a-46a—is unhelpful. It begs the question of what the constitutional limitations *are* in this context. The two deportation cases that the Fourth Circuit cited—*Zadvydas v. Davis*, 533 U.S. 678 (2001), and *INS v. Chadha*, 462 U.S. 919 (1983)—are not relevant. "Whatever the rule may be concerning deportation," it does not apply to "the determination of the political branch of the Government to exclude a given alien." *Knauff*, 338 U.S. at 543. When the Executive does the latter, *Mandel* provides that courts can review only whether it offered a facially legitimate and bona fide reason. This is not a "*no* judicial review" standard; it is a "limited judicial review" standard. *Fiallo*, 430 U.S. at 795 n.6. The President's Order easily satisfies it. *See* Pet. App. 165a-68a (Niemeyer, J., dissenting); *see also* Pet. Br. 65-69.

II. The Fourth Circuit impermissibly consulted unofficial campaign statements to determine the Order's purpose.

When a law does not regulate the admission of aliens into this country, courts sometimes search more broadly for evidence of its purpose. But the judicial inquiry must remain "deferential and limited." *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in judgment). Courts cannot engage in "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 862 (2005). Accordingly, courts usually limit their search to "the face of the legislation," "its legislative history," and "its operative effect." *McGowan v. Maryland*, 366 U.S. 420, 453 (1961); *accord Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in judgment). In

all events, the evidence of purpose must be some "official act." *McCreary*, 545 U.S. at 862; *see* Pet. Br. 73-76.

This principle has two important corollaries. First, courts should not rely on the views of private citizens to determine a law's purpose. *See Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411 (3d Cir. 2004); *Summum v. City of Ogden*, 297 F.3d 995, 1010 (10th Cir. 2002). Obviously, only the government can violate the Establishment Clause. "Private purpose" is thus not relevant unless "there is evidence that the government has adopted [it]." *ACLU of Ky. v. Grayson Cty.*, 591 F.3d 837, 850-51 (6th Cir. 2010).

Second, courts should not consult informal media statements to determine a law's purpose. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 624 n.52 (2006); *Adland v. Russ*, 307 F.3d 471, 483 n.3 (6th Cir. 2002). Statements to the media are not "official acts." And they are unreliable indicia of purpose. Such "informal communications often exhibit a lack of 'precision of draftsmanship,'" and "internal inconsistencies are not unexpected." *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 599 (5th Cir. 1995).

The Fourth Circuit ignored these principles. It concluded that the Order is a "Muslim ban" in disguise based largely on press releases, media interviews, and news articles from the 2016 campaign. This "evidentiary snark hunt" is not normal: "[n]o Supreme Court case ... sweeps so widely in probing politicians for unconstitutional motives." *Washington*, 858 F.3d at 1174 (Kozinski, J., dissental). These media statements from nongovernmental actors all suffer from the defects mentioned above. And because most were made by a political candidate in the

heat of a campaign, the statements present still more concerns.

If statements to the media are unreliable, then statements to the media by a politician in the thick of a campaign are doubly unreliable. A candidate's goal is "to get elected," not to make policy. *Id.* To get elected, the candidate must first win the primary, which requires drawing attention to himself. *See* Stephen J. Wayne, *Road to the White House 2016*, at 120 (10th ed. 2015) ("Candidates cannot win if they are not known. Recognition as a political leader is most important at the beginning of the nomination cycle ...."). "[I]nflammatory" statements often help in this regard. *Washington*, 858 F.3d at 1173 (Kozinski, J., dissental). Over the course of the campaign, moreover, a candidate must win over primary voters and the general electorate—two very different groups—all while reacting to shifting poll numbers and swirling media narratives. Unsurprisingly, "subtle (or not-so-subtle) changes in a candidate's position during the course of the campaign are common." 1 Robert North Roberts et al., *Presidential Campaigns, Slogans, Issues, and Platforms: The Complete Encyclopedia* 160 (2012). But to avoid the dreaded label of a "flip flop," candidates also tend to insist that their position has been the same all along. All of these dynamics result in a smattering of contradictory, chaotic, and ambiguous statements—not the kind of evidence that should decide the fate of a federal law or executive order.

The Fourth Circuit insisted that judges should not "shut our eyes to such evidence when it stares us in the face." Pet. App. 60a. But that is *exactly* what judges should do:

> [T]he Court ought to shut its mind to much of what all others think they see. That is precisely what courts are for. They try things out on evidence, by process of proof and refutation, and shut their minds to the kind of surmise by which the general public may reach politically sufficient conclusions. No doubt, ... courts as triers of fact draw inferences concerning matters of common knowledge in the shared experience of the community. But such common knowledge is not common gossip, or common political judgment.... [A court should not] infer, along with common gossip, that a legislature is corrupt, or that a politician is a self-seeking powermonger rather than a disinterested statesman[.]

Alexander M. Bickel, *The Least Dangerous Branch* 220 (1962). In fact, in any other case, many of the sources cited here would be disregarded as "hearsay" remarks that "do not constitute legal evidence." *ACLU of Ky. v. Grayson Cty.*, 605 F.3d 426, 430 (6th Cir. 2010). "[T]o rely in any way on what *these [sources] say* various [government officials] *said* is both incorrect and inappropriate." *ACLU of Ky.*, 605 F.3d at 430.

Nor can a court assume that the positions an official takes during the campaign will match the policies he enacts once in office. Officials "change their own thinking as a function of whether they are running for office or having to make the hard choices that come with power.... A politician who is not in office can make strong promises and claims .... Once in office, however, ... their speech and thinking become more complex than they were during the

campaign...." Roy F. Baumeister, *The Cultural Animal* 236 (2005).

Beyond these practical differences, our constitutional structure rejects any attempts to conflate a presidential candidate with the President. The President is not just a person; the President is an "Office." U.S. Const. art. II, § 1. While the Constitution vests "[t]he executive Power" in the President alone, *id.*, the President can appoint "Officers of the United States" and "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," *id.* § 2. This last part—the Opinion Clause—"place[s] the President at the apex of [an] awesome pyramid[] of power ... as Chief Administrator of the Executive Bureaucracy." Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 652 (1996). A presidential candidate thus does not have access to, and is not part of, this constitutional hierarchy. Here, for example, the Cabinet officials tasked with enforcing the Order agree that it is a vital national-security measure and targets countries with weak vetting procedures—not Muslims. *See* Sec'y John Kelly, *Statement on President's Executive Order Signed Today* (Mar. 6, 2017); Sec'y Rex Tillerson, *Remarks on the President's Executive Order Signed Today* (Mar. 6, 2017); Att'y Gen. Jeff Sessions, *Remarks on Revised Executive Order Protecting the Nation from Foreign Terrorist Entry* (Mar. 6, 2017).

Also unlike the President, a presidential candidate has not "take[n] the ... Oath" in Article II. U.S. Const. art. II, § 1. The oath requires the President to "swear" that he will "preserve, protect and defend the Constitution," *id.*, and it activates his duty to "take Care that the Laws be

faithfully executed," *id.* § 3. The oath is not a formality: it triggers the presumption that the President's actions are constitutional. *Evans v. Stephens*, 387 F.3d 1220, 1222 (11th Cir. 2004) (en banc). Indeed, while the Constitution requires all officials to take an oath, U.S. Const. art. VI, Article II actually spells out the presidential oath with "emphatic language," Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299, 338 (2016). This distinction "indicates that the President's promise may be especially demanding and unyielding." *Id.* But conflating the pre-oath intentions of a candidate with the post-oath policies of a President treats that oath as a nullity.

The use of campaign statements to find violations of the Establishment Clause raises other concerns too. For starters, it is impossible to apply. *See* Pet. App. 170a-71a (Niemeyer, J., dissenting); *Washington*, 858 F.3d at 1173 (Kozinski, J., dissental). And it invites courts to make decisions based on their subjective beliefs about the character of government officials. Moreover, the Fourth Circuit's reasoning turns the First Amendment against itself. "To view [campaign] statements as indicative of bad faith ... would ... chill political debate during campaigns ... in contravention of First Amendment values." *Phelps v. Hamilton*, 59 F.3d 1058, 1068 (10th Cir. 1995). Yet "our most basic free speech principles have their 'fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Washington*, 858 F.3d at 1173 (Kozinski, J., dissental) (quoting *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014)).

The Fourth Circuit tried to limit its ruling by emphasizing the "highly unique" and "direct" evidence in this case. Pet. App. 61a. But that is no limit at all. Consider

an example. During the 2008 presidential campaign, then-Senator Obama made a statement about "bitter" people in "small towns" who "cling to guns or religion ... to explain their frustrations"—a statement that many perceived to be anti-Christian. *Obama Angers Midwest Voters with Guns and Religion Remark*, The Guardian (Apr. 14, 2008), goo.gl/ICSSVi. After he was elected, President Obama's administration issued a regulation requiring Catholic nonprofits to, in their view, facilitate contraceptive coverage and violate their deeply held religious beliefs. *See Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016). Is Senator Obama's statement from the 2008 campaign evidence that he is an anti-Catholic bigot and, thus, evidence that the regulation has an unconstitutional purpose under the Establishment Clause? Under the Fourth Circuit's logic, a court would at least have to consider the possibility. And what may be "highly unique" and "direct" evidence of President Obama's motive to one judge may not be for another. This is where we are headed under the Fourth Circuit's approach.

Indeed, given the sheer amount of times that politicians reference the Bible in political campaigns, other possible scenarios abound. That is why considering this sort of evidence would be a "huge, total disaster." *Washington*, 858 F.3d at 1174 (Kozinski, J., dissental). This Court should not countenance it.

III. The Fourth Circuit's finding that the Order has an impermissible purpose is untenable even considering all of the evidence.

As just explained, courts should not consider unofficial statements from political candidates or nongovernmental

actors when evaluating the purpose of a federal law. But even under the no-holds-barred approach of the Fourth Circuit, there is not enough evidence here to conclude that the Order was enacted for an impermissible purpose.

Under the *Lemon* test, the government must show that the purpose on the face of the Order is "not a sham." *Edwards*, 482 U.S. at 587. This is a low bar. Courts do not invalidate laws when "a plausible secular purpose ... may be discerned from the [text]." *Mueller*, 463 U.S. at 394-95. The statements that the Fourth Circuit consulted here do not even come close to establishing that the Order's national-security justifications are a "sham."

In fact, a court could arrive at that conclusion only by plucking statements about the Order out of context and reading them in the worst possible light for the President. "[T]he purpose inquiry is not," however, "an invitation to courts to cherry pick." *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 567 F.3d 595, 601 n.7 (9th Cir. 2009). And if courts are going to treat politicians like government officials, then they should at least give political statements the deference and presumptive regularity that government officials receive.

With these principles in mind, the statements about the Order paint a very different picture: the best reading of the evidence is that the President was never motivated by anti-Muslim bias. Rather, he was always concerned with national security. His decision to abandon his initial call for a "Muslim ban" in favor of a policy focused on geography instead of religion made that abundantly clear.

The first statement that the Fourth Circuit considered was the "Statement on Preventing Muslim Immigration" that Mr. Trump posted on his campaign website in December 2015. Pet. App. 49a. True, this statement—made two months before the Iowa Caucus and over a year before President Trump signed the first executive order—focused on "Muslims." Notably, however, it was concerned with national security. It was made in response to the terrorist attack in San Bernardino, and it discussed the need to prevent the country from being "the victims of horrendous attacks." *Id.* at 10a n.5.

Moreover, statements he made during that same timeframe show that Mr. Trump never harbored anti-Muslim bias. Mr. Trump repeatedly explained that he believes that Muslims are "good people." *The War on Terror, the Political Equation*, Fox: O'Reilly Factor, 2015 WLNR 35053429, (Nov. 26, 2015); *see World News Tonight with David Muir*, ABC World News, 2015 WLNR 34794508 (Nov. 23, 2015) (same). His position was clear: "most Muslims are good, wonderful people" and it is only when "they become radicalized" that "they become different people." *MSNBC Morning Joe Interview with Donald Trump (R), Presidential Candidate, Regarding Muslims in America and Homeland Security*, MSNBC, 2015 WLNR 36290582 (Dec. 8, 2015); *see Special Report*, ABC News, 2015 WLNR 37932408 (Dec. 22, 2015) ("One thing I have to say, I have tremendous friendships in the Muslim community.... They're great people."); *Donald Trump Says His Muslim Friends Support His Muslim Ban*, Seattle Post-Intelligencer, 2015 WLNR 37529330 (Dec. 16, 2015) ("'I have many, many friends who are Muslim and they're great people,' Trump said. 'And some of them, not all of them ... but many of them called me and

they said, 'You know what, Donald? You're right. We have a problem.'").

Thus, the Fourth Circuit did not even have enough evidence, especially given the context of this lawsuit, to establish that Mr. Trump *ever* harbored the kind of animus needed to make out an Establishment Clause claim. But even if that is incorrect, the Fourth Circuit failed to appreciate that Mr. Trump clearly abandoned the initial proposal.

In May 2016, just before clinching the Republican nomination, Mr. Trump explained in a radio interview that his initial statement from December was "just a suggestion." *Kilmeade's Wide-Ranging Interview with Donald Trump*, Fox News Radio (May 11, 2016), goo.gl/C55oeX. Then, on June 13—one day after the Orlando nightclub shooting—Mr. Trump announced his new plan to "suspend immigration from areas of the world when there is a proven history of terrorism." *Transcript: Donald Trump's National Security Speech*, Politico (June 13, 2016), https://goo.gl/rn28gr. In the ensuing weeks, members of the Trump campaign explained that his new focus on "terror states" was a "changed" position and a "pivot[]" away from the initial statement he made in December. *Trump on Latest Iteration of Muslim Ban*, CNN (July 24, 2016), goo.gl/lIu40E.

Notably, that is precisely how the media covered it at the time. *See, e.g.*, *Donald Trump Back-Pedals on Banning Muslims from U.S.*, Wall Street Journal (June 28, 2016), goo.gl/UATLkc; *What Is Donald Trump Even Running on Anymore? His "Muslim Ban" Shift Sells Out His Core Constituents*, Vox (June 28, 2016),

goo.gl/nopqpn; *Trump Changing Muslim Ban to Countries with Terror Links*, Newsmax (June 27, 2016), goo.gl/VzW79d; Katherine Krueger, *Trump Pivots: Only Muslims from 'Terrorist Countries' Would Be Banned*, Talking Points Memo (June 25, 2016), goo.gl/qGxNGy; *see also The Final Push: Clinton*, FactCheck.org (Nov. 4, 2016), goo.gl/Zg0x10 ("Trump has clearly changed his initial call for a 'total and complete shutdown of Muslims entering the United States.'").

The Fourth Circuit nevertheless asserted that Mr. Trump did not really change positions, but rather "attempt[ed] to circumvent scrutiny of the Muslim ban by formulating it in terms of nationality." Pet. App. 49a. This speculative theory is not supported by the evidence.

The Fourth Circuit pointed to an interview on Meet the Press in July, where Mr. Trump was asked whether his new policy was a "rollback" from his original statement. *Id.* at 49a-50a. Mr. Trump challenged the word "rollback" but confirmed that he was "looking now at territories":

> I don't think so. I actually don't think it's a rollback. In fact, you could say it's an expansion. *I'm looking now at territories.* People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim. But just remember this: Our Constitution is great. But it doesn't necessarily give us the right to commit suicide, okay? Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful

> part of our Constitution. I view it differently. Why are we committing suicide? Why are we doing that? But you know what? I live with our Constitution. I love our Constitution. I cherish our Constitution. *We're making it territorial.* We have nations and we'll come out, *I'm going to be coming out over the next few weeks with a number of the places.*

Transcript, *Meet the Press* (July 24, 2016), goo.gl/jHc6aU (emphases added).

The Fourth Circuit read this statement as an admission that "territory" is code for "Muslim," but that reading is implausible. Mr. Trump clearly stated that he was *not* using religion and was now "looking at territories" and "making it territorial." His characterization of the territory-based proposal as an "expansion" of his initial proposal was true—looking at territories is an "expansion" in the sense that it involves considering people of *all* religions in a given territory. This is not evidence of anti-Muslim purpose.

The Fourth Circuit concluded that Mayor Giuliani confessed, during an interview on Fox News, that the territory-based proposal was just a way to create a Muslim ban that would stand up in court. Pet. App. 50a. Putting aside the absurdity of crediting a hearsay statement from a nongovernmental consultant about what the President said, *see Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in judgment), Mayor Giuliani actually said the opposite:

> OK. I'll tell you the whole history of it. So when he first announced it he said "Muslim ban."

> He called me up and said, "Put a commission together, show me the right way to do it legally." I put a commission together with Judge Mukasey, with Congressman McCaul, Pete King, a whole group of other very expert lawyers on this. And what we did was *we focused on, instead of religion, danger.* The areas of the world that create danger for us. *Which is a factual basis. Not a religious basis.* Perfectly legal, perfectly sensible, and *that's what the ban is based on. It's not based on religion.* It's based on places where there are substantial evidence that people are sending terrorists into our country.

Dkt. 171-3 at 61, *Hawai'i v. Trump*, No. 17-cv-00050 (D. Haw.) (emphases added).

The Fourth Circuit read "show me the right way to do it legally" to mean "show me how to discriminate and get away with it." But it could have just as plausibly meant "show me how to prevent terrorism from certain regions without giving the misimpression that I'm engaging in religious discrimination." Indeed, that is precisely what Mayor Giuliani said it meant in the rest of his statement. Although the Fourth Circuit credited the first two sentences of Mayor Giuliani's statement, it inexplicably did not credit his assurances that "we focused on, instead of religion, danger" and that the Order is "not based on religion." The omission is glaring.

The Fourth Circuit also found it important that, "[o]n December 21, 2016, when asked whether recent attacks in Europe affected his proposed Muslim ban, President-Elect Trump replied, 'You know my plans.

All along, I've proven to be right. 100% correct.'" Pet. App. 49a. But this statement is horribly ambiguous. The Fourth Circuit assumed "plans" meant "Muslim ban," but the only "plan" that Mr. Trump had discussed for the previous six months was his territory-based policy. As his spokesperson Kellyanne Conway explained the next day: "You're going back to over a year ago in what he said about the ban" but later "he made it much more specific and talked about countries." *Conway: Trump Will Not Pursue Immigration Ban Based Solely on Religion*, CNN (Dec. 22, 2016), goo.gl/0fDOq6. Before signing the first order, moreover, President Trump told ABC News, "[N]o it's not the Muslim ban. But it's countries that have tremendous terror." Transcript, *David Muir Interviews President Trump*, ABC News (Jan. 25, 2017), goo.gl/q5MNDV.

The few post-inauguration statements that the Fourth Circuit cited fare no better. When President Trump signed the first order, he stated: "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means." Pet. App. 50a. Any judge who claims to know what "that" means is engaged in psychoanalysis, not law. It likely does not mean "Muslim ban"—a concept the President abandoned six months earlier. Indeed, two days after signing the Order, the President reaffirmed that "[i]t's not a Muslim ban." *Here's What President Donald Trump's Immigration Executive Order Means*, ABC (Jan. 29, 2017), goo.gl/apck1X.

The Fourth Circuit also relied on two staffers who said that the Order had the same "principles" and "basic policies" as the first order with "mostly minor technical differences." Pet. App. 50a-51a. The President likewise described the Order as a "watered down" version of the

first order. Pet. App. 51a. But these statements are only relevant if the first order was a Muslim ban. And it was not, as explained above. Indeed, both staffers emphasized that the first order was a lawful national-security measure. *See Miller: New Order Will Be Responsive to the Judicial Ruling*, Fox News (Feb. 21, 2017), goo.gl/wcHvHH; *Press Gaggle by Press Secretary Sean Spicer*, White House (Mar 6, 2017), https://www.whitehouse.gov/the-press-office/2017/03/06/press-gaggle-press-secretary-sean-spicer. Moreover, none of these statements was made with respect to Muslims or the Establishment Clause. The Order was a reaction to the Ninth Circuit's decision in *Washington*, which invalidated the first order under the Due Process Clause only. The statements comparing the Order with its predecessor were all made in that context.

At bottom, the statements that purportedly show the Order is a "Muslim ban" in disguise do not hold up. Undeterred, the Fourth Circuit concluded that the Order was an attempt to discriminate against Muslims for another reason: because Mr. Trump allegedly expressed "anti-Muslim sentiment" on two occasions during the campaign. Pet. App. 49a. But in the first statement—an interview with CNN where Mr. Trump said "Islam hates us"—he clarified that the reference was to "radical Islam," not all Muslims. *Donald Trump: "I Think Islam Hates Us"*, CNN (Mar. 10, 2016), goo.gl/wcLcF7. And in the second statement—a response to the terrorist attack in Brussels—Mr. Trump clarified that he was talking about "people from the Middle East" and that he "didn't say shut it down ... I said you have to be very careful. We have to be very, very strong and vigilant at the borders." *Trump: 'Frankly, We're Having Problems with the Muslims'*, The Hill (Mar. 22, 2016), goo.gl/MmBvKO. Further, the

Fourth Circuit did not credit more recent statements from President Trump, like his speech in Saudi Arabia where he called Islam "one of the world's great faiths" and called for "tolerance and respect for each other." *President Trump's Speech to the Arab Islamic American Summit*, White House (May 21, 2017), https://www.whitehouse.gov/the-press-office/2017/05/21/president-trumps-speech-arab-islamic-american-summit.

More troublingly, by resorting to these generic statements, the Fourth Circuit was implying that the President is *generally* anti-Muslim. By this logic, *any* action that he takes with respect to a majority-Muslim country is ripe for invalidation under the Establishment Clause. Even if his early comments were somehow insensitive, they cannot "forever taint" his ability to take actions in the Middle East. *McCreary*, 545 U.S. at 873-74. The theory of the decision below is that Mr. Trump did not *mean* it when he said, repeatedly, that he had changed his initial proposal. This is not law; this is "psychoanalysis." *Id.* at 862.

In short, the decision below is not supported by the record. Read fairly and accurately, the evidence indicates that President Trump has maintained a bona fide interest in national security and that any initial calls for a "Muslim ban" were not evidence of religious animus and, in any event, were ultimately abandoned for a geography-based approach to an urgent national-security problem. The Fourth Circuit reached the opposite conclusion by cherry picking snippets of statements and reading them in the light least favorable to the President—just the opposite of what the law requires.

CONCLUSION

For all these reasons, the Court should reverse the Fourth Circuit.

Respectfully submitted,

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